SHAFI v. LIJAH.

[O. C. J. (Callow J.) September 20, 1948]

[Seremban — Originating Summons No. 64 of 1947]

Distribution — Customary Law — Adat Perpateh — Adat Temenggong.

In this case the question for decision was whether the inheritance of certain real property should be in accordance with the *adat* or the *shari'a*. The land was acquired during wedlock (*charian laki-bini*) but the titles of the land were not endorsed "customary land".

Held: (1) the lack of endorsement on the titles of customary land precluded, in the absence of strong evidence to the contrary, the *Adat Perpateh;* (2) on the evidence it was clear that the deceased intended some form of local customary law to apply and that therefore the *Adat Temenggong* should be applied in this case and the estate distributed equitably between the claimants.

Case referred to :—

(1) *Niah v. Mohamed Alias* JMBRAS, 7, (1), 1929, p. 81.

APPLICATION for Order of Distribution.

C. M. Pillai for the plaintiff.

Edgar Joseph for the defendant.

Callow J. : — This is an application for an Order that Lijah binti Hassan, Administratrix of the Estate and effects of Abdul Majid bin Pandak deceased be ordered to distribute the Estate amongst the beneficiaries and to file accounts of the said Estate on or before a date to be fixed by the Court. And that the costs of this application be paid out of the Estate, and that the costs be taxed by a proper officer of this Court.

The cause first came before the Court on the 6th of September, 1948, when by consent account was ordered.

The issue now to be decided is, again by consent, whether the inheritance of certain real property should be in accordance with the *adat* or the *shari'a*.

On the death of Abdul Majid the family consisted of the widow Lijah and two adopted daughters Hamida and Rokiah, three sisters Munah, Meau and Natah, a brother Shafi, the mother Peah and a nephew Abdul Hamid the son of Natah. A month after the death of Abdul Majid the mother Peah died and later Natah died also.

It was agreed that the land in dispute was acquired during wedlock (*charian laki bini*), and it is admitted that the titles are not endorsed as Customary land.

The proceedings therefore took the form of a trial, Shafi, Meau, Munah and Abdul Hamid claiming (as plaintiffs) interests by virtue of the *shari'a,* against Lijah (also as guardian *ad litem* of Rokiah a minor) and Hamida (as defendants) demanding the whole in accordance with the *adat.*

The plaintiffs are members of the *Anak Achih* (No. 11 in Schedule B of Cap. 215), and the defendants of the *Sri Lemak* tribe (No. 5 in Schedule B of Cap. 215). There was no agreement as to who should begin, but after hearing such evidence as the parties chose to place before the Court, it would seem that as the land was not endorsed Customary the onus of proof was upon the defendants to show that the custom should be observed.

With the exception of Hamida the parties were represented by Counsel, and I think it was unfortunate that so little evidence was adduced. The plaintiffs called only Shafi, a young man who could do little more than assert that the *shari'a* should be followed; the defendants were more helpful, calling the *Lembaga* of *Sri Melenggang* (No. 3 in Schedule B of Cap. 215).

After hearing the evidence and having reference to the works of *Parr and Mackray* (Royal Asiatic Society Journal December 1910), *Wilkinson's Malay Law,* and *Taylor* (Royal Asiatic Society Journals August 1929 and May 1937) I am satisfied that in the absence of strong evidence to the contrary, which was not forthcoming, the lack of endorsement on the titles of customary land precludes the *Adat Perpateh.* It is always open to a land owner to request the endorsement of title as customary, and it could be inferred from the omission in this case that the late Abdul Majid did not desire the land to be subject to the *Adat Perpateh,* although I do not believe inheritance or succession in accordance with the law of the Shafii sect of the Sunni School of Islam was ever contemplated.

But although the more defined tenets of the *Adat Perpateh* may not in this case be adhered to, there remains the still older and perhaps more fundamental *Adat Temenggong,* which one might perhaps almost term the common law behind the more statutorised *Adat Perpateh,* though whereas in England statutory law evolved *from* the common law, in this country one might almost conclude the reverse — that the *Temenggong* is from the law or codes of by-gone generations. I suggest this notwithstanding *Wilkinson's* observations at page 40 of his work "The true *Adat Temenggong* of Malaya was an unwritten law"; it was and is unwritten, deriving its origin from the lawgivers of ancient times. Another simile is that *Adat Temenggong* was as the royal prerogative, and exercised in suitable cases where strict adherence to the *Adat Perpateh* would cause hardship. The holder of the Ministerial Office of Temenggong exercised on behalf of the ruler the prerogative which could not be challenged, it was an autocratic decree, and should in

proper circumstances the *Adat Perpateh* conflict or differ from the code of conscience the *Adat Temenggong* could be invoked and so over-rule the former.

It seems to me clear, and I accept the evidence of Lijah accordingly, that the deceased Abdul Majid acquired this property for the benefit of his widow and adopted daughters. He did not contemplate the administration of his estate in accordance with the inheritance scales contained in the Shafii School of Muhammedan Law. He intended some form of local customary law to apply, although he was probably quite vague as to detail or principles.

Therefore, although the *Adat Temenggong* is depreciated by *Wilkinson* (at page 45), and although *Taylor* regards it as essentially the same as the *Adat Perpateh* (Royal Asiatic Society Journal May 1937 page 3) I distinguish the two *Adats* and rule that the *Adat Temenggong* should apply.

This means that the estate should be distributed equitably between the claimants, such division being decided by the circumstances of the particular case before the Court. It is not a division necessarily to be followed in every such case.

Before proceeding further it is necessary to consider the status of Hamida and Rokiah. Lijah claimed that they were adopted daughters.

It is established that proof of adoption ceremonies is essential (*Taylor,* Royal Asiatic Society Journal August 1929 Chapter IV, page 39 *et seq.*). It is insufficient to sustain this by the mere assertion of adoption given by Lijah in evidence — Hamida did not even testify at all.

There are certain recognised ceremonies of adoption, and proof of such is essential to support any claim of adoption status. This necessity for the ceremonies was evidenced by Dato Mendika Haji Taib, the *Lembaga* of *Sri Melenggang* tribe, and he gave also some surprising evidence to the effect that the present *Undang* of Rembau has forbidden adoption. If this is indeed so, I can only conceive that it is directly against Rembau customary law. The truth may be that the *Undang,* while recognising the validity of adoption, disapproves of the practice.

However to return to the question of the status of Hamida and Rokiah, their adoption is not proved and they can have no claim in or share of the estate. This, of course, does not affect the right of Lijah to bequeath or transfer any share she may now enjoy.

It may be convenient here to observe the conflict between *Parr & Mackray* (Royal Asiatic Society Journal December 1910, page 76) and *Taylor* (Royal Asiatic Society Journal August 1929, page 26) as to the devolution in accordance with the *Adat Perpateh* of property acquired during wedlock (*charian laki bini*) on the demise of either party to the marriage, there being no issue. *Parr & Mackray* hold that the property should be divided between the surviving spouse and the family of the deceased; *Taylor* holds that all should go to the surviving spouse. After consultation with authorities available I am satisfied that the latter ruling is correct; all should go to the surviving spouse (*Niah v. Mohamed Alias*[1]), but if the survivor is the husband, the titles of any real property should be endorsed customary land, and a caveat entered against disposal; in other words the husband may enjoy a life interest with reversion to the distaff line of the family.

However, the decision in the case before me is that *Adat Temenggong* is applicable, and in exercise of my equitable powers in this *adat* I divide the lands listed in Exhibit A, such land being *charian laki bini,* between the widow Lijah on the one part and on the other to those of the deceased's family who may by custom be entitled thereto. In consequence Lijah as Administratrix of the Estate of Abdul Majid bin Pandak (deceased) is hereby ordered to distribute the said estate; the distribution to be one half to herself Lijah, and one half to be divided between the kin of the deceased Abdul Majid; the division to include the share to which the mother Peah and the sister Natah may have been entitled.

Having decided the application of the *Adat Temenggong,* the distribution of the half among those members of the family of Abdul Majid who survived him, must be by custom and not by the *shari'a.* Indeed distribution by the *shari'a* would be complicated by the death of the mother Peah and the sister Natah occurring after the death of the deceased Abdul Majid and before distribution. If difficulty or dispute is experienced in the customary distribution among the kin of the deceased Abdul Majid there is liberty to apply.

The costs of the present action are to be borne by the estate. Should any subsequent proceedings arise therefrom a separate order as to costs will be necessary.

Order accordingly.